



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

**FILED**

05-30-07

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In the Matter of the Application of California American Water Company (U 210 W) for a Certificate of Public Convenience and Necessity to Construct and Operate its Coastal Water Project to Resolve the Long-Term Water Supply Deficit in its Monterey District and to Recover All Present and Future Costs in Connection There with in Rates.

A.04-09-019  
(Filed September 20, 2004)

## **MOTION OF THE DIVISION OF RATEPAYER ADVOCATES FOR WAIVER OF CERTAIN *EX PARTE* RULES**

Pursuant to Rule 1.2, 9.1, and 11.1 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure ("Rules"), the Division of Ratepayer Advocates ("DRA") files this motion requesting a waiver of Rule 8.5 for certain communications with Commissioner Advisors concerning DRA's efforts regarding the Monterey Regional Water Supply Reliability Dialogue activities.

As discussed below, the circumstances surrounding this request create a special case for granting the requested waiver. As such, there is good cause for the Administrative Law Judge ("ALJ") to issue a Ruling granting a waiver from Rule 8.5 in this limited instance.

### **I. BACKGROUND**

In 1995, the State Water Resources Control Board ("SWRCB") adopted Order 95-10, which found that California-American Water Company ("Cal Am") was annually diverting approximately 10,730 acre-feet more water from the Carmel River Aquifer than it was legally entitled to divert. In 1995, 10,730 represented 69 percent of Cal Am's water supply for the Monterey District. Order 95-10 required Cal Am to find a new

source of water to replace its practice of diverting over and above its legally entitled water supply of 3,376 acre feet per year from the Carmel River. SWRCB also ordered Cal Am to reduce pumping from the Carmel River by 20 percent from historic levels, until a new water supply was found.

In 1998, the California Legislature approved Assembly Bill 1182 requiring the Commission to develop a long-term water supply contingency plan to meet the water needs of Monterey Peninsula residents. In July of 2002, the Commission published this plan, which is often referred to as “Plan B”. Plan B recommended the construction of a desalination plant and an aquifer storage and recovery facility.

In September of 2004, Cal Am adopted the Plan B concepts and filed Application (“A”) 04-09-019 with the Commission seeking a Certificate of Public Convenience and Necessity to construct and operate the Coastal Water Project and to recover all costs in rates. The major elements of the Coastal Water Project include a desalination plant, desalination water conveyance facilities, and aquifer storage and recovery facilities.

In July 2005, Cal Am filed an Amended Application that submitted its Proponent’s Environmental Assessment for the Coastal Water Project. The Amended Application indicated that Cal Am has shifted the focus of the Coastal Water Project from a regional project to a project that addresses only Cal Am’s water supply needs. Cal Am stated that this shift occurred because it appeared that Monterey County agencies and neighboring water districts needed more time than anticipated to reach a consensus on the issues of participation in, governance and financing of a larger, regional facility. (Amended Application, p. 4.) Cal Am stated that because of the pressing need to develop a new water supply for Cal Am Monterey District customers, it believed that it was most prudent to proceed with the construction of the proposed project.

In late 2006, DRA began the process of establishing what is now known as the Monterey Regional Water Supply Reliability Dialogue. DRA engaged Steve Kasower and the Urban and Regional Water Research Team from the University of California, Santa Cruz to assist DRA in representing the Cal Am ratepayers by facilitating a dialogue among public agencies, interested members of the public, and environmental groups.

The dialogue will be devoted to reliable water supply project planning designed to develop a viable phased alternative project and management strategy that has a better chance of successful implementation than the Coastal Water Project and has higher ratepayer and community-wide benefits. Based on its initial discussions with local agencies and members of the public, it appeared a facilitated dialogue regarding a regional approach to water supply management and supply development had a greater potential to resolve the conflict and confer benefits on Cal Am ratepayers.

The Monterey Regional Water Supply Reliability Dialogue has met five times since its formation early this year. The meetings are open to the public and have been well attended and included representatives from a diverse group of stakeholders including California American Water Company (“Cal Am”), local public agencies such as Monterey Peninsula Water Management District, the Monterey County Water Resources Agency, the Monterey Regional Water Pollution Control Agency, and public interest groups.

DRA plans to continue to facilitate meetings of the Monterey Regional Water Supply Reliability Dialogue as long as the meetings are productive. DRA is hopeful that through this Group, a regional alternative to the Coastal Water Project will be developed that has greater ratepayer and public benefits and will have enhanced political and public support.

## **II. WAIVER OF RULE 8.5**

DRA seeks a waiver of Rule 8.5 for certain communications with Commissioner Advisors regarding the activities of the Monterey Regional Water Supply Reliability Dialogue. Rule 8.5 makes communications with Commissioners’ personal advisors subject to all of the restrictions on, and reporting requirements applicable to, ex parte communications, except that oral communications in ratesetting proceedings are permitted without the restrictions set forth in Rule 8.2(c) (1) and (2).<sup>1</sup>

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<sup>1</sup> **Rule 8.2** (c) In any ratesetting proceeding, ex parte communications are subject to the reporting requirements set forth in Rule 8.3. In addition, the following restrictions apply:

(continued on next page)

Specifically, DRA seeks a waiver of Rule 8.5 for Commissioner Advisors' attendance at meetings of the Monterey Regional Water Supply Reliability Dialogue. DRA also seeks a waiver of Rule 8.3 (a), the reporting of written ex parte communications regarding the Monterey Regional Water Supply Reliability Dialogue to Commissioner Advisors, when DRA has distributed the written communications to all parties to the proceeding on the same day the communications are provided to the Commissioner Advisor.

Pursuant to Rule 9.1, ALJs can take such action as may be necessary and appropriate to discharge the ALJ's duties as long as the actions are consistent with statutory or other authorities under which the Commission functions and with the rules and policies of the Commission. Rule 1.2 permits the Commission to allow deviations from its rules when it is a special case and when there is good cause. As discussed below, the waiver DRA seeks meets these requirements.

**A. There is Good Cause to Grant the Waiver in this Special Case**

DRA requests the ALJ issue a ruling waiving the ex parte rule for two types of communications with Commissioner Advisors regarding the Monterey Regional Water Supply Reliability Dialogue. First, DRA requests that the ALJ grant a waiver of Rule 8.5 for Commissioner Advisors' attendance at meetings of the Monterey Regional Water Supply Reliability Dialogue. Second, DRA requests that the ALJ grant a waiver of Rule

(1) All-party meetings: Oral ex parte communications are permitted at any time with a Commissioner provided that the Commissioner involved (i) invites all parties to attend the meeting or sets up a conference call in which all parties may participate, and (ii) gives notice of this meeting or call as soon as possible, but no less than three days before the meeting or call.

(2) Individual oral communications: If a decisionmaker grants an ex parte communication meeting or call to any party individually, all other parties shall be granted an individual meeting of a substantially equal period of time with that decisionmaker. The party requesting the initial individual meeting shall notify the other parties that its request has been granted, at least three days before the meeting or call. At the meeting, that party shall produce a certificate of service of this notification on all other parties. If the communication is by telephone, that party shall provide the decisionmaker with the certificate of service before the start of the call. The certificate may be provided by facsimile transmission or electronic mail.

8.3 (a), the reporting of written ex parte communications regarding the Monterey Regional Water Supply Reliability Dialogue to Commissioner Advisors, when DRA has distributed the written communications on all parties to the proceeding on the same day the communications are sent to the Commissioner Advisor.

DRA has received requests from Commissioner Advisors for information about the activities of the Monterey Regional Water Supply Reliability Dialogue. These requests have included requests for meeting documents and requests for post-meeting briefings. DRA has reported these communications as required under the Rules. DRA understands that at least one Commissioner Advisor has expressed interest in attending future meetings.

If a Commissioner Advisor attends one of the Monterey Regional Water Supply Reliability Dialogue's public meetings, during the course of these meeting, parties to the Coastal Water Project proceeding would need to consider whether their discussions and contributions to the dialogue concerned a substantive issue in the CWP proceeding. For example, discussion by Group members during these public meetings on issues such as water supply needs of Monterey or the merits of one supply alternative over another would likely need to be reported under the Commission's ex parte rules if a Commissioner Advisor were in attendance. This additional burden of monitoring one's contribution to the meeting for the purpose of reporting the contact could unnecessarily inhibit parties' participation.

Moreover, the rules create unnecessary work by requiring DRA and other parties to the proceeding who are participating in the dialogues to file ex parte notices for the distribution of the Monterey Regional Water Supply Reliability Dialogue documents to Advisors when the documents themselves have already been served on the service list to the proceeding on the same day they were provided to the Advisors. DRA is in the process of creating a website for the Monterey Regional Water Supply Reliability Dialogue and expects to have that site up in the coming weeks. All documents that are distributed to the Group or to the Advisors will be posted on the website and thus available to any party wishing to follow the progress of the Group's activities

If DRA provides meeting materials or other Monterey Regional Water Supply Reliability Dialogue documents to a Commissioner Advisor, it will continue to comply with the *ex parte* rules and forward those documents to all parties on the service list on the same day it provides the documents to Advisors. DRA merely seeks a waiver of the requirement to also file a written notice of these communications.

Because those interested in the Group's progress will receive all documents DRA provides to the Commissioner Advisors as they are provided, and all Group documents will be accessible on a website, further distribution and notice of those documents through a written notice of *ex parte* communication is unnecessary.

**B. The Requested Waiver Does not Conflict with Statutory Requirements**

Commission Rule 8.5, which subjects Commissioner Advisors to many of the *ex parte* rules applicable to Decisionmakers, is not a statutory requirement and can be waived by the Commission.

Public Utilities Code § 1701.3 sets forth the restrictions on *ex parte* contacts in ratesetting proceedings. Public Utilities Code § 1701.1(c)(4) defines an *ex parte* communication as an oral or written communication between a decisionmaker and a person with an interest in a matter before the commission concerning substantive, but not procedural issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter. (Emphasis added.)

As required by Section 1701.1(c)(4)(C), the Commission adopted a definition of “decisionmaker” in Rule 8.1, which states a “decisionmaker” is any Commissioner, the chief Administrative Law Judge (“ALJ”), any Assistant Chief ALJ, the assigned ALJ or the Law and Motion ALJ. Commissioner Advisors are not considered Decisionmakers.

The requirements of Rule 8.5 regarding communications with Advisors are not mandated by statute and can be waived by the Commission pursuant to Rule 1.2. As discussed above, good cause exists in this special case to waive the requirements of Rule 8.5 for communications regarding the activities of the Monterey Regional Water Supply Reliability Dialogue.

The purpose of the *ex parte* rules is to prohibit private conversations with decisionmakers concerning substantive issues of a proceeding. Because DRA will continue to serve all written documents provided to Commissioner Advisors to the service list, and because the Monterey Regional Water Supply Reliability Dialogue meetings are public and have public agendas, no untoward access to decisionmakers will occur if the requested waiver is granted.

### III. CONCLUSION

For the reasons set forth above, DRA requests that the ALJ issue a Ruling granting DRA's request for a waiver of Rule 8.5 for Commissioner Advisors' attendance at public meetings of the Monterey Regional Water Supply Reliability Dialogue and a waiver of Rule 8.3 (a), for the reporting of written *ex parte* communications regarding the Monterey Regional Water Supply Reliability Dialogue to Commissioner Advisors, when DRA has distributed the written communications on all parties to the proceeding on the same day the communications are provided to the Commissioner Advisor.

Respectfully submitted,

/s/ MONICA MCCRARY

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Monica McCrary  
Staff Counsel

Attorney for the Division of  
Ratepayer Advocates

California Public Utilities Commission  
505 Van Ness Ave.  
San Francisco, CA 94102  
Email: [mlm@cpuc.ca.gov](mailto:mlm@cpuc.ca.gov)  
Phone: (415) 703-1288  
Fax: (415) 703-2262

May 30, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of “**MOTION OF THE DIVISION OF RATEPAYER ADVOCATES FOR WAIVER OF CERTAIN *EX PARTE* RULES**” in **A.04-09-019** by using the following service:

☒ **E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

☐ **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on **May 30, 2007** at San Francisco, California.

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/s/ Imelda C. Eusebio

Imelda C. Eusebio

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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afhubb@aol.com  
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wyrddjon@yahoo.com  
tgulesserian@adamsbroadwell.com  
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